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Supreme Court Rules

Rule 19, Considerations Governing Review on Certiorari, of the United States Supreme Court Rules 6, 7, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

WILLIAM C. RUSCH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW.

The opinion of the Appellate Court of the State of Illinois, printed in Appendix A hereto, is reported at 3 Ill. App. 3d 500, 278 N.E. 2d 198.

QUESTIONS PRESENTED.

1. Whether a writ of certiorari should issue to consider a possible federal question which was not decided by such State Appellate Court below.

2. Whether in probationary hearing and in sentencing procedures the rules of evidence are more relaxed than in hearings to determine the guilt of a defendant so as to permit the trial judge in a probationary hearing and in a sentencing hearing to independently study and research the testimony of petitioner's treating psychiatrist without denying the petitioner the right of confrontation of witnesses against him and of due process of law in the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF CASE.

1. Lower State Court Proceedings.

Petitioner, William Rusch was convicted in the Circuit Court for the Nineteenth Judicial Circuit, McHenry County, Illinois, for driving on a suspended or revoked driver's license and for failing to reduce speed to avoid an accident. On August 14, 1969, he was released on probation for a period of two years.

On April 24, 1970, he was charged with driving a motor vehicle with a suspended or revoked license. Also on April 24, 1970, the People of the State of Illinois filed a petition to revoke petitioner's probation, claiming that petitioner had violated a provision of his probation order prohibiting the operation of a motor vehicle unless he has in his possession a valid driver's license.

On June 16, 1970, petitioner entered a plea of guilty to the April 24, 1970, charge of driving while license suspended or revoked. Also on June 16, 1970, petitioner was granted leave to file a petition for release on probation, which was filed on June 30, 1970.

The People's petition for revocation of probation and the petitioner's petition for release on probation were consolidated for investigation and for hearing. A hearing was held on both petitions on October 2, 1970. On October 16, 1970, the People's (respondent's) petition to revoke petitioner's probation was granted and his probation was revoked. Also, petitioner's motion to be released on probation was denied.

During the course of the hearings on the People's petition to revoke and on the petitioner's petition to be released on probation, which were consolidated, the petitioner introduced into evidence the testimony of his psychiatrist, Dr. Marvin Ziporyn. Dr. Ziporyn testified that the results of his examination of Mr. Rusch showed that he had a "passive, aggressive personality disorder."

In announcing his opinion to revoke probation and to deny petitioner's motion to be released on probation the trial court judge stated that he had independently researched and studied the concept of a "passive-aggressive personality." This statement is the basis of the instant action, requesting the United States Supreme Court to issue a Writ of Certiorari.

On November 20, 1970, petitioner filed a motion to vacate the order revoking probation and denying petitioner's petition to be released on probation. This motion was denied on December 21, 1970. Petitioner filed an appeal to the Appellate Court of the State of Illinois, Second Appellate District, Elgin, Illinois.

2. State Appellate Proceedings.

In the Opinion of the Appellate Court, Mr. Justice Guild wrote that Mr. William Rusch "presented two issues to this court for review, the first being that the trial court abused its discretion in revoking his probation . . . The second contention of the defendant is that the sentence imposed, 90 days in the State Penal Farm at Vandalia, is excessive."

With respect to the first issue, the Appellate Court pointed out that over a 12 year period the petitioner

had been convicted of seven charges of speeding, three other traffic offenses, and two charges of driving while intoxicated. In addition, the Court pointed out that the petitioner's license had been suspended four times. The Appellate Court concluded that "rehabilitation could (not) . . . be accomplished without the penalty being imposed."

Concerning the excessive penalty issue, the court pointed out that the maximum penalty for the offense charged is one year at the State Penal Farm and that, considering petitioner's driving record, "the penalty imposed of 90 days is not only not excessive but also most lenient under the facts of this case."

Without discussing the issue which is the subject matter of this instant petition, the Illinois Appellate Court affirmed.

Petitioner petitioned the Illinois Supreme Court for a hearing, but such petition was denied.

REASONS FOR DENYING THE WRIT.

I. The state court below did not decide the purported federal question of substance presented to this Court.

II. The purported federal question presented in petitioner's brief has already been determined by the United States Supreme Court.

III. Regarding the purported federal question in this case, there is no conflict between the conduct and rulings of the sentencing judge and the applicable decisions of the United States Supreme Court.

ARGUMENT.

I.

WHERE THE STATE COURT BELOW DID NOT DECIDE THE PURPORTED FEDERAL QUESTION OF SUBSTANCE PRESENTED TO THE UNITED STATES SUPREME COURT, THE WRIT OF CERTIORARI WILL NOT ISSUE.

Rule 19 of the Supreme Court Rules sets out general considerations which govern the court's exercise of judicial discretion in determining whether to issue a writ of certiorari to review a decision of a state court. Paragraph 1(a) of Rule 19, which is the paragraph relevant to the review of state court decisions, reads:

> (a) Where a state court *has decided* a federal question of substance not theretofore determined by this court, or *has decided* it in a way probably not in accord with applicable decisions of this court.

The question which the petitioner asks the United States Supreme Court to review has never been decided by the State Appellate Court below. Decided below were two issues: the first being that the trial court abused its discretion in revoking probation; the second being that the 90 day sentence imposed is excessive. There is no indication in the record that the defendant argued the United States Constitutional aspects of the question here presented. Furthermore, the state court below made no *decision* concerning the federal question petitioner raises. Regarding the confrontation question presented, there is no state court decision to review; there is no appellate court decision as a result of this case now contained in

the vast volumes of decisions which could mislead lawyers, judges and the population generally about the nature of the Sixth and Fourteenth Amendments; and there is no issue, carefully formulated and decided below, which is ripe for decision by the United States Supreme Court.

Rule 19, 1(a) provides that the writ may issue when a federal question has, i.a., been decided by a state court. The instant case fails to meet this requirement.

II.

WHERE THE PURPORTED FEDERAL QUESTION HAS ALREADY BEEN DETERMINED BY THIS COURT, THE WRIT OF CERTIORARI WILL NOT ISSUE.

Paragraph 1(a) of Supreme Court Rule 19 provides that a writ of certiorari may issue to a state appellate court if the state appellate court "has decided a federal question of substance not *theretofore determined by this court.*" (emphasis added)

Although petitioner in his brief does not exactly state, in terms of Supreme Court Rule 19 (Considerations Governing Review on Certiorari), why the writ should issue, it is implied in petitioner's statements that "the cases are few concerning the particular question involved in this petition" and that "the only federal case that has touched upon it, *Gordon* v. *United States* (6 Cir., 1949) 178 F. 2d 896, had to construe the Illinois authorities" that the United States Supreme Court has not heretofore decided the question.

This very question was decided by this Court in *Williams* v. *New York,* 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). In that case the jury recommended that appellant after being convicted of murder in a fair trial be

given life imprisonment. But, the trial judge, after considering appellant's previous criminal record—without permitting him to confront or cross examine the witnesses on that subject—sentenced him to death. This Court (7-2) rejected the contention that the death sentence violated due process in that "it was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross examination or rebuttal." The United States Supreme Court, per Justice Black, recognized that the due process clause does provide the safe-guards of confrontation and cross examination "(w)here the question for consideration is the guilt of a defendant," but pointed out that there are sound historical and practical reasons for different evidentiary rules governing trial and sentencing procedures:

> "Highly relevant—if not essential—to (the trial judge's) selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." (337 U.S. at 247)
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> "(T)he modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of his information make totally impractical if not impossible open court testimony with cross examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." (337 U.S. at 250)

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"The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." (337 U.S. at 251)

See also *Williams* v. *Oklahoma*, 358 U.S. 576, 3 L. Ed. 2d 516, 79 S. Ct. 421 (1959).

In implying that the United States Supreme Court has not decided the question at issue, petitioner fails to distinguish between the evidentiary rules governing trial in which the question of guilt is determined and those governing sentencing procedures. Each of the Illinois appellate court cases cited by petitioner involved private investigations by the trial court judge or considerations by the trial court judge of out of court statements which could have or did influence the court's determination of the question of guilt.

In the instant case, petitioner had previously entered a plea of guilty to the charge of driving a motor vehicle while his driver's license was revoked. The question of petitioner's guilt or innocence was therefore not before the Court. What was before the Court was the sentence to be imposed. The petitioner had called a psychiatrist to testify in his behalf in a probationary hearing. In his testimony the psychiatrist discussed a "passive-aggressive personality." According to the trial judge's statement at the time of imposing sentence he did "some independent research" concerning the nature of a "passive-aggressive personality" and concluded that petitioner's psychiatrist was correct in testifying that "passive-aggres-

sive personality is another word for 'bad temper'." This "research", the results of which were incidentally consistent with the testimony of petitioner's expert, was done not for the purpose of determining guilt but to select and determine an appropriate sentence. And, once again, as this Court said in *Williams* v. *New York, supra.*,

> "Highly relevant—if not essential—to (the sentencing judge's) selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence property applicable to the trial."

The above discussion clearly shows that, with respect to the right to confront witnesses in sentencing procedures, the United States Supreme Court, in the *Williams* case, has already decided the "due process" question presented in the instant case. And Rule 19 provides that a writ may issue "where a state court has decided a federal question of substance not theretofore determined by this Court."

III.

WHERE THERE IS NO CONFLICT BETWEEN THE RECORD REGARDING THE PURPORTED FEDERAL QUESTION OF SUBSTANCE AND THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, THE WRIT OF CERTIORARI WILL NOT ISSUE.

Although the confrontation question raised by petitioner was not, as pointed out *supra*, the subject matter of a lower appellate court decision, there is, nevertheless,

no inconsistency between the conduct of the trial court judge in the probationary hearing and sentencing procedures and applicable decisions of this Court. The record with regard to this question is in complete accordance with *Williams* v. *New York, supra.* And for this reason, based once again on Supreme Court Rule 19, the writ of certiorari should not issue.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. JUSTICE GUILD delivered the opinion of the court:

The defendant herein was originally convicted of driving on a suspended or revoked license and failing to reduce speed to avoid an accident. On August 14, 1969, he was released upon probation. One of the conditions of his release obviously being that he was not to drive a motor vehicle during his probation. Apparently the probation order did not alter the defendant's desire to drive an automobile and on April 24, 1970, he was again charged with driving a motor vehicle with a suspended or revoked license. He was not prosecuted on the April 24, 1970 charge but rather it was used as the basis for the petition for revocation of the probation previously granted. A revocation petition was filed in the original proceedings and the defendant likewise filed another petition for release on probation. The petition for revocation and the petition for another probation were consolidated and heard on October 2, 1970. On October 16th, 1970 the defendant's new petition for release on probation was denied, his probation was revoked and following a hearing in aggravation and mitigation the defendant was sentenced to serve 90 days in the State Farm at Vandalia. The defendant was released on bond pending this appeal.

The defendant has presented two issues to this court for review, the first being that the trial court abused its discretion in revoking his probation. Defendant points out that the statutory provision pertaining to probation

is found in Ill. Rev. Stat. Ch. 138, Sec. 117-1 (1969). An examination of those provisions is most interesting. The first is that the defendant is not likely to commit another offense. In this case the defendant has in fact committed exactly the same offense after being released upon probation. The second statutory provision found is that public interest does not require the defendant to receive the penalty. An extended hearing was had in aggravation and mitigation and we find that from 1957 to August 14, 1969, the date the defendant was originally placed on probation, the defendant had been convicted on seven charges of speeding, three other traffic offenses, was involved in one collision, had been convicted twice of driving while intoxicated, and his license had been suspended four times by the Secretary of State. The public interest of this State certainly requires the penalty and a substantial penalty for such flagrant violations of the motor vehicle laws of this State. The third statutory provision pointed out by the defendant in Section 117-1 above provides that a person may be admitted to probation where the rehabilitation of the defendant does not require that he receive the penalty provided. Defendant's counsel states that the rehabilitation of the defendant here does not require that he receive the penalty. After a total of at least twelve serious motor vehicle violations ranging from speeding to driving while intoxicated, and notwithstanding this, the granting of probation to the defendant, does not in any way indicate that the rehabilitation could or should be accomplished without the penalty being imposed.

(Appellate Court Opinion)

The second contention of the defendant is that the sentence imposed, 90 days in the State Farm at Vandalia, is excessive. The maximum penalty that may be imposed under Ill. Rev. Stat. Ch. 95½, Sec. 6-303, (1969) is one year in jail. In view of the above record and in view of the violation of probation by the commission of exactly the same offense, to-wit: the driving of a motor vehicle while license is suspended, the penalty imposed of 90 days is not only not excessive but also most lenient under the facts of this case. Sec. 6-303, *supra,* provides for a mandatory jail sentence of at least seven days while driving while a license is suspended or revoked. Apparently the legislature of this State felt that this offense was serious enough to warrant a jail sentence in the first instance. In the instant case the defendant here committed the second offense in addition to the many other motor vehicle violations. The record does not disclose that he even received the seven day sentence in jail for the first offense.

Judgment affirmed.

P. J. MORAN and J. ABRAHAMSON Concur.